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No. 748

In the Supreme Court of the United States

October Term, 1959

GEORGE OPPENHEIMER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 744

GEORGE OLSHAUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (Pet. i–vii; R. 52–59) are not officially reported. The opinion of the Court of Appeals (Pet. ix–xvii) is reported at 273 F. 2d 23.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1959. (Pet. xviii.) The taxpayer's petition for rehearing was denied on January 19, 1960. (Pet. xix.) The petition for a writ of certiorari was filed on February 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the deficiency notice procedure established by the Internal Revenue Code may be used in enforcing the additions to tax prescribed by Section 294(d)(1)(A) of the 1939 Code.

2. Whether the Tax Court remedy invoked by petitioner is constitutionally objectionable because it does not offer a jury trial.

3. Whether the Tax Court proceeding violates due process in that it places the burden upon the taxpayer to show reasonable cause for his failure to file a declaration of estimated tax.

4. Whether the courts below erred in holding that the taxpayer failed to show that his failure to file declarations of estimated tax was due to reasonable cause.

STATUTES INVOLVED

The pertinent provisions of Sections 58, 271(a), 272(a)(1) and 294(d)(1)(A) of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 8–12.

STATEMENT

The relevant facts are undisputed and may be briefly summarized as follows:

The taxpayer is an attorney who did not file declarations of estimated tax for 1952 and 1953. (Pet. ii; R. 53.) The Commissioner issued a deficiency notice in which he made the following explanation (Pet. iii; R. 54):

> You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No rea-

sonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

The taxpayer filed a petition for redetermination with the Tax Court (R. 3–9) but subsequently filed an amendment to his petition in which he contended that the Commissioner erred in issuing a deficiency notice to him (R. 14–15). The Tax Court held (Pet. iii–vii; R. 54–58) that it had jurisdiction to adjudicate the case; that the taxpayer's failure to file declarations of estimated tax for 1952 and 1953 was not due to reasonable cause; and that the taxpayer was liable for additions to the tax for both years under Section 294(d)(1)(A). The Tax Court also held (Pet. vii; R. 58–59) that the taxpayer was liable for the additions under Section 294(d)(2) of the 1939 Code for substantial underestimation of taxes. The Court of Appeals (Pet. ix–xvii) affirmed the Tax Court with respect to the imposition of the additions for failure to file declarations but, on the authority of this Court's decision in *Commissioner* v. *Acker*, 361 U.S. 87, reversed the Tax Court with respect to the imposition of the additions for substantial underestimation.

ARGUMENT

The decision below is correct, there is no conflict of authority, and there is no occasion for review by this Court.

1. The taxpayer contends (Pet. 14–17) that the deficiency procedures, set forth in Section 272 of the

Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10–11), may not be utilized to enforce additions to tax under Section 294(d)(1)(A) (Appendix, *infra*, pp. 11–12) for failure to file a declaration of estimated tax where there is no deficiency in the tax apart from the additions. Yet the taxpayer himself invoked the jurisdiction of the Tax Court. The decision below, holding that the Tax Court had jurisdiction, conforms to other decisions under the 1939 Code involving only additions to the tax. *Newsom* v. *Commissioner*, 219 F. 2d 444 (C.A. 5th), affirming, *per curiam*, 22 T.C. 225; *Davis* v. *Dudley*, 124 F. Supp. 426 (W.D. Pa.); *Meyers* v. *Commissioner*, 28 T.C. 12; *Marbut* v. *Commissioner*, 28 T.C. 687; see *Granquist* v. *Hackleman*, 264 F. 2d 9, 13–14 (C.A. 9th); cf. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930. The same view has been followed in analogous cases arising under the 1954 Code. See *Granquist* v. *Hackleman*, *supra*; *Enochs* v. *Muse*, 270 F. 2d 528 (C.A. 5th); *Strawberry Hill Press, Inc.* v. *Scanlon*, 273 F. 2d 306 (C.A. 2d).[1]

2. The taxpayer contends (Pet. 6–14) that the Tax Court proceedings were unconstitutional in that they deprived him of a right to a jury trial in violation of

[1] The addition for failure to file a declaration was omitted from the 1954 Code. The procedures to be followed with respect to certain other additions has received recent legislative consideration. See Act of May 14, 1960, P.L. 86–470, 74 Stat. 132, amending Section 6659(b) of the 1954 Code (26 U.S.C. 6659(b)), so as to do away with the required deficiency procedures in the case of certain additions. See, also, H. Rep. No. 1217, 86th Cong., 2d Sess.; S. Rep. No. 1098, 86th Cong., 2d Sess.

the Sixth and Seventh Amendments. It has long been settled that Section 294(d)(1)(A) imposes a civil sanction and that the Sixth Amendment accordingly does not apply. See *Helvering* v. *Mitchell*, 303 U.S. 391; *Spies* v. *United States*, 317 U.S. 492, 495; *Walker* v. *United States*, 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939. Nor is there any basis for the taxpayer's contention that the collection of a civil penalty under the taxing statute must be prosecuted as a common law action of debt (to which the Seventh Amendment would be applicable). Tax Court remedies are statutory. *Wickwire* v. *Reinecke*, 275 U.S. 101, 105–106; *Helvering* v. *Mitchell*, *supra*; *Walker* v. *United States*, *supra*; *Harvey* v. *Early*, 160 F. 2d 836 (C.A. 4th).[2] And, as the Court of Appeals pointed out (Pet. xiii), the taxpayer invoked those remedies. If he desired a jury trial, he could have paid the amount assessed and sued for refund in the district court. There is no merit to the contention (Pet. 12–13) that conditioning the right to jury trial upon prepayment violates the Seventh Amendment. See *Flora* v. *United States*, 362 U.S. 145; *Helvering* v. *Mitchell*, *supra*; *Walker* v. *United States*, *supra*; *Harvey* v. *Early*, *supra*.[3]

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[2] The cases relied upon by the taxpayer, such as *Leimer* v. *Woods*, 196 F. 2d 828 (C.A. 8th); *United States* v. *Regan*, 232 U.S. 37; and *Hepner* v. *United States*, 213 U.S. 103, are not in point. They involved statutes which provided that penalties were to be prosecuted in the manner of a common law action of debt.

[3] The taxpayer errs in contending (Pet. 13) that taxes, historically, have been collected by administrative action, whereas penalties have been enforced by jury trial. For example, the taxpayer does not deny that where the jurisdiction of the Tax

3. Since the inference of willful neglect follows logically from the fact of an unexplained failure to file a declaration, there is plainly no deprivation of due process in imposing the burden of proof upon the taxpayer to show that there was reasonable cause for his dereliction. See *Boynton* v. *Pedrick*, 228 F. 2d 745 (C.A. 2d), certiorari denied, 351 U.S. 938.

4. Finally, there is no merit to the taxpayer's contention (Pet. 23–24) that civil sanctions may not be imposed on the basis of facts determined by an administrative agency. *Helvering* v. *Mitchell*, *supra*, p. 402; *Walker* v. *United States*, *supra*, pp. 603–604; *Spies* v. *United States*, *supra*, p. 495. Moreover, the taxpayer completely overlooks the fact that the Commissioner's determination that additions were owing is not conclusive, but is subject to a full judicial review before an independent tribunal. Here, the taxpayer availed himself of the opportunity for such review. Both courts below, having considered the facts of record, determined the disputed issue against him.

Court attaches because there is a deficiency in the tax, that court also has jurisdiction to determine the amount of the penalty. See, *e.g.*, *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; and Sec. 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable but including every alien individual who is a resident of Puerto Rico during the entire taxable year) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of $4,500 plus $600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed $100 for the taxable year and his gross income to be $600 or more.

* * * * *

(d) *Time and Place for Filing.*—

(1) *In general.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

* * * * *

(3) *Return as declaration or amendment.*—If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the decla-

ration permitted by paragraph (2) to be filed on or before such January 15.

• • • • •

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 271 [As amended by Sec. 14(a), Individual Income Tax Act of 1944, *supra*]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

• • • • •

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its col-

lection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 294. [As amended by Sec. 118(a), Revenue Act of 1943, c. 68, 58 Stat. 21; and Sec. 13(b) of the Individual Income Tax Act of 1944, *supra*]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) *Estimated Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount

thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

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